Denver Law Review

Volume 27 | Issue 11 Article 6

June 2021

Johnson v. Shriver: Powers, Uses and the Rule in Shelley's Case

Dicta Editorial Board

amicable settlements arising out of World War II may yet come back to harass the administrators of estates and cloud titles in the years to come unless handled by resort to the courts.

In view of the present state of the law, the proper solution probably would be legislation similar to that of California, holding such second marriages, contracted in good faith, valid until declared invalid by a court of competent jurisdiction. Such legislation should also include a bar to any collateral attack on the second marriage, in order to preserve with some degree of certainty the rights of children or heirs of parties to such marriage.

JOHNSON V. SHRIVER: POWERS, USES AND THE RULE IN SHELLEY'S CASE

In *Barnard v. Moore*,[1] Mr. Justice Denison said, "We shall assume, without deciding, that the rule in Shelley's Case is in force in Colorado, i.e., if a freehold estate be limited to A, remainder to his heirs, he takes a fee simple. . . ."

Johnson v. Shriver [2] comes very close to deciding that the Rule in Shelley's Case is not in force in Colorado. The interests involved were created by the following language: " . . . in trust for the said Ada Conroe, for and during her natural life. . . . Upon the death of the said Ada Conroe . . . then said property shall vest in the heirs at law of said Ada Conroe. . . . "

This language falls squarely within the Rule in Shelley's Case as that Rule was stated by Mr. Justice Denison. A freehold is limited to Ada Conroe, remainder to her heirs. Yet it was held, without referring to the Rule, that Ada Conroe did not take a fee simple. Is this a repudiation of the Rule, or did the facts bring this case within an exception to the Rule? This is a difficult question.

Ada Conroe's interest was expressly limited to a life estate, but that of course would not prevent the operation of the Rule—in fact, it is one of the prerequisites that the ancestor be given an estate less than a fee simple. Otherwise the interest limited to his heirs would not be a remainder, but would be an executory interest, and the Rule applies (except in the case of appointed interests) only to remainders.

It might be proper to suggest parenthetically that the remarkable persistence of the Rule seems not to be attributable so much to a fondness for the feudal doctrine, or to an indifference to manifested intention, as to its modern effectiveness as a means of clearing titles.

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[1] 71 Colo. 401, 406, 207 P. 332, . . . (1922).

[2] — Colo. —, 216 P. 2d 653 (1950). It is assumed that the reader of these comments will have read the opinion itself; therefore, no statement of the case will be made.

For example, in this very case the Abstract of Record, p. 23, states that, " . . . the abstract (of title) . . . shows two attempts by the testatrix (Ada Conroe) to alienate parts of the trust property in her lifetime, contrary to the provisions of the trust agreement." The lawyers who examined the title for those two grantees may have relied upon the Rule in Shelley's Case, and they would surely value its protection now.

FACTORS WHICH MIGHT PREVENT OPERATION OF RULE

There are, in this case of *Johnson v. Shriver,* several factors which might appear to prevent the operation of the Rule.

The first such factor is that some of the property was Kansas land. The descent of that land would of course be determined by the law of Kansas, and therefore the limitation of a remainder to "the heirs at law of said Ada Conroe, under the laws of descent of the State of Colorado . . . " was not, as to the Kansas land, a limitation to the heirs of Ada Conroe, as such, and so did not fall within the Rule in Shelley's Case.

If the property had all been Colorado land (as almost all of it was), the limitation would no doubt have been held to be to Ada Conroe's heirs in the technical sense required by the Rule. What is the effect of this situation in which the words mean "heirs" as applied to Colorado land, but not as to Kansas land? No authority has been found, but it would seem that in such a case the inapplicability of the Rule to the Kansas land would not affect its applicability to Colorado land.

Second, as another factor which might appear to exclude the Rule, there is the spendthrift provision:

> We direct that neither the income from said trust estate . . . nor the principal fund or trust property shall be liable for her [Ada Conroe's] debts, past, present or future; nor shall said income or trust property be subject to the right of any creditor of said beneficiary to seize the same under any writ or by any proceeding at law or in equity. And said beneficiary shall not have any power to give, grant, sell, convey, mortgage, pledge, or otherwise dispose of, incumber, or anticipate the income, or any installment thereof, it being our will that no right of disposition of any such property shall vest in said beneficiary, except by her will as herein provided.

This language is plain enough; and if the Rule in Shelley's Case were a rule of construction it could not, in view of this provision invest Ada Conroe with an alienable estate in fee simple. But the Rule has never been a rule of construction, but a rule of law; and spendthrift provisions should not prevent its operation.[3]

[3] SIMES, THE LAW OF FUTURE INTERESTS, § 129, note 16 (1936). GRISWOLD, SPENDTHRIFT TRUSTS, § 277 (1947), cites cases both ways, but the two holdings that the rule is not applicable dealt with personalty to which the rule is not applicable anyhow. Bennet v. Bennet, 217 Ill. 434, 75 N.E. 339 (1905), the first case cited by Griswold, makes this distinction, "As applied to a devise of real estate, the position of the appellant [that the Rule in Shelly's Case applies in spite of spendthrift provisions] is sound. . . . As applied to gifts or conveyances of personalty the word 'heirs' strictly speaking has no application . . . and the Rule in Shelly's case . . . is held to yield to the express intention of the testator."

Third, another factor which might seem to exclude the Rule, is the provision by virtue of which the remainder given to the heirs of Ada Conroe was subject to destruction by an executory limitation—the exercise of a general testamentary power by Ada Conroe. It is established, however, that the destructibility of the remainder does not render the Rule in Shelley's Case inapplicable.[4]

REQUIREMENT THAT BOTH ESTATES BE LEGAL OR EQUITABLE

There remains a fourth factor in this case which probably does justify the exclusion of the Rule. However this conclusion is not clear, and the problem seems to merit some discussion. The Rule in Shelley's Case is applicable only to those situations in which the estate of the ancestor and the remainder to his heirs are both legal, and to those in which they are both equitable. In other words, if one interest is legal and the other is equitable, the Rule does not apply. In this case the remainder to the heirs of Ada Conroe is plainly legal:

> Upon the death said Ada Conroe, cestui que trust, the trust herein created shall cease and determine, and when said trust is terminated, the trust property . . . shall immediately vest in and become the property of the devisees and legatees named in the will of said Ada Conroe, or in the event that said Ada Conroe leaves no will, then said property shall vest in the heirs at law of said Ada Conroe. . . .

There is no duty imposed upon the trustees with respect to this ultimate remainder—not even a duty to convey. In such a case it is clear that the remainder is not equitable, but legal. Therefore, the Rule would be applicable if the life estate of Ada Conroe were legal; but not if the life estate were equitable. Which is it? It was obviously intended to be equitable. The Agreement recites, " . . . we hold the title to said . . . property, in trust for the said Ada Conroe, for and during her natural life . . . " But the Statute of Uses was enacted for the very purpose of defeating such intention. When the Statute is applicable, it converts what was intended to be an equitable interest into a legal interest.

APPLICABILITY OF STATUTE OF USES

Is the Statute applicable? This is a fairly close question. The property involved is a freehold interest in land, and there is no use upon a use. This makes the question turn entirely upon whether the trust is active or passive. If it is passive, the Statute of Uses converts the life interest of Ada Conroe into a legal estate in spite of the clear intention of the parties that the interest should be equitable.

There were conferred upon Ada Conroe, "the beneficiary," powers which are usually exercised by a trustee:

[4] SIMES, *ibid* at note 15.

> We hereby appoint said Ada Conroe, our agent to control and manage said trust estate; to rent and receive the income therefrom; to apply said income, primarily to the payment of interest upon the incumbrances thereon, taxes and repairs; and to use the remainder of said income for her personal support and benefit.

What is there left for "the trustees" to do? Nothing, unless it be found in that paragraph which provides that,

> If it shall become or appear advisable to said trustees, during the period of said trusteeship, to sell or transfer any of said trust property, the same shall only be done by deed of conveyance executed by all of said trustees; and if any of said trustees shall die during the life of said trust, the remaining trustees, or trustee shall continue said trust.

The provisions of this paragraph may appear to be superfluous because they merely state, in effect, that the trustees shall be deemed to be joint tenants, and this common law rule has not been affected by statute in Colorado. In this case, however, there are other circumstances which the draftsman may have had in mind, and which would amply justify the inclusion of this paragraph.

The trust property consisted of ten tracts of land owned by Emma M. Shriver as tenant in severalty; three tracts owned by Clifford A. Conroe as tenant in severalty; and one tract owned by Clifford A. Conroe and Richard H. Conroe as joint tenants. No attempt was made expressly to convey the legal title to these tracts to the trustees. The only instrument signed by the three owners merely recited:

> Now, therefore, these presents witness that we hereby jointly and severally declare, that we hold the title to said above mentioned and described property, in trust for the said Ada Conroe. . . .

It is to be noticed that this joint and several declaration did not purport to be descriptive of the tenancy by which the trustees were to hold. (There is of course no such thing as a joint and several tenancy.)

Furthermore, the words, "we hold title to the said above mentioned and described property in trust . . . " do not say, " we jointly hold title," and might well mean, "we each hold title to the said property as above mentioned and described." This meaning would refer back to that language in which the property was mentioned and described as follows:

> Whereas the undersigned Emma M. Shriver is the owner of the following described property; . . .
>
> And whereas, Clifford A. Conroe is the owner of the following described property; . . .
>
> And whereas Clifford A. Conroe and Richard H. Conroe are joint owners of the following described property.

It would appear, therefore, since there had been no transfer of the legal title of any of these tracts, that they could be conveyed

by the separate deeds of the respective legal owners, without any participation by the other parties to the agreement.

It seems not unlikely, therefore, that the draftsman considered it proper to clarify this aspect of the transaction by the explicit provision that the sale "or transfer of any of said trust property . . . shall only be done by deed of conveyance executed by all of said trustees. . . . "

Furthermore, it seems doubtful that the words which introduced this paragraph, "If it shall become or appear advisable to said trustees, during the period of said trusteeship, to sell or transfer . . . " were intended to be anything more than introductory. The power to sell is not expressly conferred; it is assumed.

If the purpose had been to confer a power or to impose a duty it would seem that some standard for the determination of advisability would have been mentioned, such as, "in their own uncontrolled discretion," or "for the best interests of the said Ada Conroe." Nothing like that appears. Nor is there any provision as to what should be done with the proceeds of such sale, whether they shall be reinvested in land, whether they shall be reinvested in some other way, or whether they shall be paid over to the beneficiary. The absence of some such provision also suggests that the paragraph was not included for the purpose of conferring a power or imposing a duty. The inference would seem rather to be that the power of the trustees to sell and transfer the legal title to their own tracts of land was taken for granted, and that it was the draftsman's intention merely to create by this paragraph legal relationships like those which would have resulted from a conveyance of the land to the trustees in joint tenancy.

A Passive Trust?

In view of these considerations it might well have been found that the attempted trust was passive, and that it was therefore executed by the Statute of Uses. Two cases in which the beneficiary was authorized to exercise powers comparable to those conferred in this case upon Ada Conroe are *Craig v. Kinsey*[5] and *City National Bank and Trust Co. of Evanston v. Pearsons.*[6] In the former, the trustees were given somewhat more power, and the trust was not executed; in the latter, the trustees were given somewhat less power, and the trust was executed.

If this trust was passive, then it was executed by the Statute of Uses, in which case both the life estate of Ada Conroe and the remainder to her heirs would be legal, and the Rule in Shelley's Case would be applicable. The result would be that the remainder which seemed to be limited to the heirs of Ada Conroe would be vested in her in fee simple, and her life estate would merge in the

[5] 370 Ill. 32, 18 N.E. 2d 895 (1938).
[6] 307 Ill. App. 548, 30 N.E. 2d 774 (1941).

remainder, so that she would have a present legal estate in fee simple in possession.

The foregoing argument finds some support in the conduct of Ada Conroe. The order of the District Judge recites:

> It is obvious that the testatrix [Ada Conroe] had erroneous ideas as to what power she had under the trust agreement. In the first paragraph of the will she directs that all of her just debts, except those that are secured by liens be paid. This would indicate that she thought she owned this property and was liable for the lien indebtedness thereon. And further, the abstract produced shows two attempts by the testatrix to alienate parts of the trust property in her lifetime, contrary to the provisions of the trust Agreement.

It is not known how far these "attempts" were carried, nor whether the trustees acquiesced.

A Fee Simple With Appendant Power of Appointment?

If Ada Conroe did have a present legal estate in fee simple, she could, as owner, convey it inter vivos or by will, or let it descend to her heirs. Could she also have, appendant to the same land, a power of appointment, as distinguished from a power to convey? The Restatement of the Law of Property says that in the United States no such power appendant can exist; but the orthodox cases at common law do recognize such powers.

To summarize: if the trust were passive, and if the Rule in Shelley's Case were in force in Colorado, and if the Restatement's rule that powers appendant do not exist were the law of Colorado, then of course the creditor of Ada Conroe could reach the property because it was her own legal estate in fee simple.[7]

But the decision is otherwise. Therefore it must be concluded that the trust was active, or that the Rule in Shelley's Case is not in force in Colorado, or that powers appendant do exist in Colorado. None of these problems inherent in the case is mentioned in the abstract of record, the briefs, or the opinion.

EXERCISE OF POWER OF APPOINTMENT BY PROVISION IN WILL

So much for the problems that were not mentioned in the opinion. Many others were. One such problem, together with the court's answer, was, in part, as follows:[8]

> FIRST: *Where a power of appointment was created, as hereinabove stated, will an exercise of that power in favor of creditors result from a statement in the will of the donee of the power that all the just debts of testatrix [donee] shall be paid?*
>
> The question is answered in the negative. . . . There is no presumption that the direction to pay debts, contained in the will was

[7] Another effect of the execution of the trust by the Statute of Uses would be to render invalid the attempted restraints on alienation, even though the Rule in Shelley's Case were not in force, because no provision is made for the termination of the life estate upon attempted alienation. This question was of course moot because the life tenant had died, but it is worth noting because the opinion assumes the validity of these restraints.

[8] 216 P. 2d 653, 656-657 (1950).

> in fact an exercise of the power of appointment possessed by testatrix. An intention to execute the power must be affirmatively shown, and that intention must be so clearly established that the transaction is not fairly susceptible of any other interpretation.

In its consideration of this problem the court makes no reference to a fact which it had already mentioned in another connection, and which should have been decisive on this point, namely: "the fact that there were no assets in the estate also stands admitted." Therefore, the first paragraph of the will could have no effect whatsoever unless it were as the exercise of the power. In such circumstances the case falls squarely within the proposition above quoted from the opinion, " . . . that the transaction is not fairly susceptible of any other interpretation."

This rule has been recognized in two other Colorado cases. *Barnard v. Moore*, supra, which the court cites for another proposition in its discussion of this very point, contains this language:

> It seems that a deed containing no reference to the power will not be regarded as an exercise thereof, unless otherwise there would be nothing for the conveyance to operate on.

The other Colorado case, *Bennett v. Laws* [9] is mentioned infra.

The three cases upon which the court relies in concluding that the direction to pay debts did not exercise the power are all distinguishable on this very point, because in none of them did it appear, as it does here, "that there were no assets in the estate." Those three cases contain this distinguishing language:

> The will . . . makes no reference to the power or to the property covered by it, and there is no evidence that it would be inoperative without the aid of the power. There is no evidence of the kind, condition, or value of the property, if any, owned by the testator.[10] . . .

> Testatrix died possessed of an individual estate and also of an estate over which she had power of appointment. . . . We agree with the court below that there is nothing in the above-quoted portion of the will or in other parts of it, to show any intention other than that testatrix's individual estate.[11] . . .

> The principal question upon this appeal is whether there has been a blending of the individual estate of testatrix with an estate over which she had a power of appointment.[12] . . .

One who reads the opinion in *Johnson v. Shriver* might be justified in assuming that counsel for the creditor had overlooked the decisive importance of the fact that there were no assets in the estate. This assumption is supported by the court's statement that, "Claimant does not here directly argue that the direction to pay debts, standing alone, would show an exercise of the power of appointment."

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[9] 59 Colo. 290, 149 P. 439 (1915).
[10] Emery v. Emery, 325 Ill. 212, 156 N.E. 364 (1927).
[11] In Re Valentine's Estate, 297 Pa. 99, 146 Atl. 453 (1929).
[12] In Re Stannert's Estate, 339 Pa. 439, 15 A. 2d 360 (1940).

It is somewhat surprising, therefore, to find the following language in the claimant's brief:

> The first theory of the claimant is that Ada Conroe was exercising her power to give the property described in the trust agreement to anyone she might name in her will when in the first paragraph of her will she directed the payment of all her just debts as soon as convenient after her decease and intended that her creditors should be and therefore are her first appointees. This theory is strengthened by the consideration of the third paragraph of her will in which only the residue of the estate of which she is seized or possessed or which she is empowered to convey by will is conveyed to her children named. Although the testatrix does not specifically mention the power in this first paragraph, viewing the will as a whole, considering the fact she had no other property, it is logical to conclude that she intended to and did make her creditors her appointees and that her debts should be satisfied before the appointees named in the residuary clause should receive any part of her estate.
>
> The claimant's position that it is unnecessary for the instrument or a particular sentence or paragraph thereof to mention the power in order to be construed to be an exercise of the power where it cannot otherwise operate because of the fact that the donee had no property upon which it could operate has been established as the rule in Colorado in these words:
>
> "It is thoroughly settled everywhere that, when the instrument does not mention the power but could have no material operation except as executing it, it shall be treated as intended to have that effect." *Bennett v. Laws*, 59 Colo. 290, quoting from Reeves on Real Property, Vol. 2, P. 1237.
>
> The fact that the will was made December 2, 1946, less than six months before she became deceased May 25, 1947, is another surrounding circumstance favorable to the position of claimant.
>
> The case of *Blake v. Hawkins*, 98 U.S. 315, states that where a will is made shortly before the death of the appointor, it may be presumed that the financial condition of the appointor was the same as at the time of death, and that the provisions of her will should be construed upon the premise that the financial condition of the appointor was the same at the time the will was made as at the time of her death. In that case, the court held the testatrix was exercising her power of appointment because she willed more property than she had without considering the property which she had the power to convey.
>
> It follows from the application of the above mentioned rules of law to the undisputed facts that the donee of the power intended to and did exercise the power given her in the trust agreement.

It is apparent that the claimant did argue the point, pertinently and logically, and for two pages of the brief.

As further bearing on the intention of the testatrix to exercise the power by directing that her debts be paid, it is worthwhile to note that the district judge stated in his conclusions of law, "It is the opinion of the Court that the testatrix treated all of this property as her own and intended that her debts should be paid therefrom. . . . " This would seem to have required a holding in favor of the creditor, but the district court further concluded that:

> It is the opinion of the court that the testatrix by this will made no attempt to exercise the power of appointment contained in the

> trust agreement and had no more right to dispose of this property as her own than she had in the attempted conveyances she made in her lifetime.

In other words, even though Ada Conroe could have appointed the "trust property" to her creditors (or to her own estate, since the power was general), she did not attempt to do so, but she tried instead to treat the property as her own—an attempt which the district judge held to be invalid as an effort to violate the spendthrift provisions of the agreement.

The district judge's concluding statement on this point was,

> The only relief she was warranted in extending to her creditors under the provisions of the trust agreement was to make a specific bequest to such of her creditors as she desired of such property as she should select.

This language is quoted in the opinion of the Supreme Court and is followed by the statement, "we are in accord with this view."

Insofar as this conclusion is based upon the spendthrift provisions of the agreement, it is weakened by the dubious validity of the attempt to create a merely equitable life estate in Ada Conroe. But if the validity of the trust and of the spendthrift provisions be assumed, then it is evident that the court is admitting that those provisions do not prevent an effective exercise of the power in favor of creditors—in fact the court shows just how it should be done—in a way which is not suggested by the terms of the agreement.

What the court appears really to be saying is that the testatrix *could not* treat the property over which she had a general testamentary power as if it were her own estate. No authority for such a proposition has been found other than one Maryland case decided in 1888.[13] The rule to the contrary is supported by abundant authority.[14]

With respect then, to the first question set forth in the opinion it would appear that on the facts of this case the answer might properly have been in the affirmative.

Rights of Creditors As Against Appointees

After having answered the first question in the negative, the court next finds that the power was exercised by the second and third paragraphs of the will, and then proceeds to consider the third question:[15]

> THIRD: In exercising the power of appointment by naming the original donors of the power, in whom the legal title to the property remained prior to the exercise of the power, did the donee appoint mere "volunteers" and thereby give rise to rights in her creditors?

[13] Balls v. Dampman, 69 Md. 390, 16 Atl. 16 (1888).
[14] See cases collected in 93 A.L.R. 967.
[15] 216 P. 2d 653, 658 (1950).

This question, as stated, obviously begs the question as to whether the rule in favor of creditors of the donee of a general power is applicable only when the appointment is to volunteers, and this same assumption is made in the court's answer:[16]

> The rule for which claimant contends is stated as follows: . . . If such a power . . . is exercised in favor of the one who pays no consideration, "a volunteer," the property is thereby made assets in equity for payments of the donee's debts. . . . Thus, even under this rule the respondents must be shown to have the status of "volunteers" before the creditor claimant is entitled to the relief sought.

The court finds that the appointment was not to "volunteers", and then concludes, "On claimant's own theory she accordingly fails to bring the case within the rule for which she contends." This statement of "the claimant's own theory" is more narrow than that contained in the brief of the plaintiff in error, wherein claimant argued:

> The rule of law that the property covered by a general power of appointment . . . is liable for the debts of the donee at her death . . . [applies] . . . where she appoints the property to volunteers and in some instances to creditors.
>
> . . . Where [as in this case] the power is to convey by will, the limitation [of the rule to appointments] to "volunteers" does not apply.

The point is that with respect to conveyances generally, and regardless of powers of appointment, a debtor may prefer one creditor to another by a conveyance inter vivos (subject of course to avoidance by trustee in bankruptcy); but no such preference can be effectuated by a will.

A further indication that the claimant did not concede that her claim would be good only as against "volunteers," is found in her statement of the case wherein she apparently placed her chief reliance upon *State Street Trust Co. v. Kissell.*[17] That statement is in part as follows:

> The court found that the appointees were creditors of the grandchild at the time the will was made and at the time of his death . . . and that the share of the grandchild should pass to all of the donee's creditors, not by will but by the rule of law that: "Equity seizes the property on its way from the donor to the appointees and applies it to the satisfaction of the debts of the appointor."

Even if it were assumed that the rule in favor of creditors applied only when the appointment was to volunteers, it was necessary to determine whether the appointees in this case were volunteers. On this point the court's opinion is as follows:

> We adopt the words of the learned trial judge, who said, in disposing of this point: "In this case the rule is sought to be enforced

[16] *Ibid.*
[17] 302 Mass. 328, 19 N.E. 2d 25 (1939).

> against the owners of the property, and under no stretch of the imagination can they be considered volunteers. . . ."

It may have been easier for the court to adopt these words of the trial judge than to explain them, especially in view of the fact that in the preceding paragraph of the opinion, the court gave the ordinary meaning to "volunteer," namely, "one who pays no consideration."

DOES PROPERTY BECOME EQUITABLE ASSETS FOR CREDITORS?

A fourth question was propounded and answered as follows:

> FOURTH: In this jurisdiction is the rule to be adopted that, where a general power of appointment is exercised by the donee in favor of a volunteer the appointive property becomes assets in equity for payment of the donee's debts?
>
> . . . While an answer to this question is not essential to an affirmance of the judgment, for the reasons already stated, the question is presented by this record, and we deem it advisable to give the answer for the guidance of counsel in determining possible future action with relation to those who took property as volunteers under the terms of the second paragraph of the will. Our considered opinion is that the rule stated in the question should not be adopted in Colorado. We believe that better reasoning is to be found in the cases from jurisdictions which do not recognize the rule.

The court then cites several cases, each of which will be considered in the order in which it was cited by the Colorado court.

Rhode Island Hospital Trust Co. v. Anthony,[18] is somewhat weakened by this language:

> If we were convinced of the soundness of the English doctrine, there are circumstances surrounding this case which would cause us to refuse to direct this complainant to turn over these trust estates to the executor to be taken by him into a foreign jurisdiction there to be administered. The respondent executor has not satisfied us that the assets of the estate of Miss Beckwith upon a prudent administration are insufficient for the payment of her debts.

In Re Howald's Trust [19] is somewhat weakened by this language:

> The facts of the instant case are to be distinguished . . . in that [the donee] after exercising the power of appointment, expressly provided: "This bequest is subject to all my just debts" . . . It is our conclusion that the plaintiff trustee . . . should pay to the executor an amount sufficient to comply with this provision of the will. . . . It therefore follows that so much of the appointed property as is required for the payment of debts will be paid by the plaintiff trustee to the executor and thereafter it comes a part of her estate.

Fidelity-Philadelphia Trust Co. v. McCaughn [20] involved the construction of section 402 (e) of the Revenue Act of 1919. The court said:

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[18] 49 R. I. 339, 142 Atl. 531 (1928).
[19] 65 Ohio App. 191, 29 N. E. 2d 575 (1940).
[20] 34 F. 2d 600 (1929).

> The Congress thus had the power to tax any transmission of property affected by death even though by the law of the descendent's domicile such property was not part of his estate . . . therefore conclude that the property passing under the exercise of Mrs. Cole's power of appointment was "property passing under a general power of appointment," within the meaning of the Revenue Law.

The rule in favor of creditors was mentioned in discussing the history of the Revenue Act, but was held not to be material in this case.

Balls v. Dampman [21] is a square decision against the creditor, and explains the general theory of powers, but does not deal with the rule in favor of creditors.

Cutting v. Cutting [22] contains this distinguishing language,

> We think too that it is clearly indicated in the revisers' notes to the Revised Statutes . . . that it was then conceded that he English rule [in favor of creditors] was the law of this state at that time. And we need not now go farther in that inquiry, for we have come to a conclusion . . . that the English rule has been abrogated by our Legislature.

Boyle v. Smyth Co.[23] is commented upon in 97 A.L.R. at 1072 as follows:

> In *Boyle v. John M Smyth Co.* . . . the court said that while that doctrine (in favor of creditors) expressed the general rule in England, which had been followed by courts of high authority in this country, the doctrine had been severely criticized, and, in so far as the briefs disclosed, it had never been approved by the courts in Illinois. Attention is, however, called to the Illinois cases on page 1514 of the earlier annotation (59 A.L.R. 1510) recognizing the English doctrine. It further appears that the question did not arise on the facts, as there were no creditors.

St. Matthews Bank v. De Charette [24] is also somewhat weakened by this language,

> The English doctrine was embodied in our statutory law at that time . . . the statute was enacted in 1796 and is to be found in Littell's Laws, page 597 . . . moreover, may it not be said, well and logically, paralleling the line of thought of the New York court in *Cutting v. Cutting, supra,* that since our Kentucky statute was subsequently repealed, it was the intent of the Legislature that he doctrine itself should be abrogated . . . ?

One more question: What should become of those two lots in Wichita, Kansas?

T. G. M.

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[21] 69 Md. 390, 16 Atl. 16 (1888).
[22] 86 N. Y. 522 (1881).
[23] 248 Ill. App. 57 (1928).
[24] 259 Ky. 802, 83 S.W. 2d 471 (1935).